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Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-299

UNITED STATES OF AMERICA,

Petitioner,

—v.—

AFRAN TRANSPORT COMPANY, AS OWNER OF THE STEAMSHIP NORTHERN GULF, *et al.*,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petition adequately sets forth the citations of the Court of Appeals and District Court opinions, and the jurisdictional requisites.

Questions Presented

The questions presented by petitioner (p. 2)* characterize cautionary notes in the Code of Federal Regulations as a regulation having the force of law for the purpose of shifting the burden of proof under "The Pennsylvania" rule, 19 Wall. 125 to NORTHERN GULF, requiring her to show that failure to take bearings not only might not or probably did not but could not have contributed to the stranding.

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* Unless otherwise specified, all page references herein are to the petition and appendices A-D thereto.

The questions presented do not dispute that the cautionary language in the Code of Federal Regulations fails to mandate or prohibit any particular conduct sufficient to invoke the drastic rule of The Pennsylvania and ignores the specific conclusion of the District Court, affirmed by the Circuit Court of Appeals, that the cautionary language was just that (pp. 46, 61). "It is the essence of all cases that the statute or regulation be mandatory in character, as the rule is designed to compel compliance with clearly defined duties" (pp. 27-8).

Statement

The relevant facts, set forth in the Court of Appeals' opinion (pp. 19-20), are that on a bright, clear day, with almost unlimited visibility, the steamship NORTHERN GULF bound for Portland, Maine with a cargo of crude oil, on a course of 276° passed Portland Lightship abeam 700 yards off her port side and took on a compulsory state pilot, one-half mile northwest of the lightship in Casco Bay. Captain Harlan L. Wadleigh, the pilot, took the conn and set a course with the vessel heading 315° true, with Portland Head Light fine on the port bow and Buoy No. 2 marking West Cod Ledge Rock 15° on the starboard bow. Captain Wadleigh intended to pass one-quarter mile off Buoy No. 2. No bearings to obtain fixes were taken on the 315° course and had any such bearings been taken they would have shown that the NORTHERN GULF was on a course to pass safely by West Cod Ledge Rock. When Buoy No. 2 was off the starboard beam, Captain Wadleigh began his turn to starboard toward Witch Rock Buoy. During that swing it was manifestly impossible to take a running fix in time to avoid the stranding. Buoy No. 2 was 350 to 400 yards off

its charted position, which could not have been known to the pilot due to the wide expanse of open water in Casco Bay.

Petitioner has conceded its negligence in failing to maintain the Buoy in its proper position and now seeks to have this Court review the evidence and formulate a standard of care which it failed to establish at the trial.

ARGUMENT

Petitioner contends that there is an important question concerning the duty of a harbor pilot to utilize fixed aids to navigation rather than to rely upon floating buoys, premising its argument on the cautionary language in 33 C.F.R. §62.25-55 "as construed by the Coast Guard" who had the responsibility to maintain the "vast number of buoys" and an impertinent reference to the recently enacted Water Quality Improvement Act (pp. 9-10). Precise navigation of large tankers in restricted areas requires accurately marked channels and obstructions to permit prompt maneuvers to avoid other vessels and obstructions to navigation without risk of stranding in shallow water. The Coast Guard assumed this responsibility and petitioner cannot now argue that it is imprudent or negligent for a navigator to rely on a buoy to fix the position of a vessel. *Indian Towing Co.* v. *United States of America*, 350 U.S. 61, 69. The Court of Appeals said:

> "[I]n the absence of some suspicious circumstances or notice, navigators are entitled to rely upon the representations made in the Government charts relative to the location of the buoys" (p. 21).

To hold otherwise would be to preclude the use of a buoy as an aid to navigation in pinpointing the position of a vessel, which was the Coast Guard's expressed reason for maintaining the United States buoyage system. ("Buoys in Water of the United States," 1942; District Court opinion p. 46.)

The Trial Court on all the evidence, including the testimony of expert witnesses who regularly navigate large supertankers in and out of Casco Bay and other ports, found that the Coast Guard was negligent in maintaining Buoy No. 2 on its charted position and held that there was no negligence on NORTHERN GULF's part (pp. 41, 48). The forty-seven findings of fact, reviewed and affirmed by the Court of Appeals, amply support those conclusions.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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July 15, 1971